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A COUNTRY WITHIN A COUNTRY: REDRAWING BORDERS ON THE POST-COLONIAL SOVEREIGN STATE

Suzan Dionne Balz*

This Essay seeks to identify the conflict that exists between the demands for self-governance by Canada's First Nations and the interests of the Canadian state. The author elucidates this conflict by identifying two major differences between the perspectives of Canada's First Nations' demands for self-governance and the interests of the Canadian state: the privileging of the collective versus the privileging of the individual, and the two very different notions of "territory." The author concludes that the doctrine of sovereign statehood as developed out of European Nationalism stands as an obstacle to the self-determination of non-western peoples such as the First Nations because it requires the people within the territory of the state to have no allegiance apart from the state. Yet the author concludes that it is precisely this doctrine of sovereignty that may lead to some possibility for reconciliation. International organizations, created in the post-war era in response to the realization that global problems need global administration, offer a model, in that they have international administrative jurisdictions directly in contravention of the territorial sovereignty of states. The author argues that territory is no longer necessarily the characteristic of a political entity in the international arena, and therefore it is possible to imagine the recognition of stateless nations as subjects of international law.

INTRODUCTION

The reconciliation of the conflicting interests of First Nations¹ and of the Canadian state is now considered imperative² for a just

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The author expresses thanks to her friends whose opinions and ideas have greatly contributed to the researching of this Essay, and all those who stood at Oka and provoked yet another symptom of crisis.

1. "First Nations" is a term that refers to the indigenous peoples that lived in countries such as Canada prior to its colonization by Europeans. See also *infra* notes 10–12 and accompanying text (summarizing First Nations' demands for self-determination); Part I.B (identifying First Nations' demands).

2. This has not always been the case. The instances of disrespect for First Nations self-government in Canada are too numerous to list and, for Canadians at least, constitute a well-known litany. Salient examples nonetheless include federal legislation from

society, as is demonstrated by the abundance of literature written on the subject, recent Canadian jurisprudence, and the constitutionalization of First Nations rights in Section 35 of the Constitution Act of 1982.³ This significant change in attitude can be located in the important disjunction between the colonialist and imperialist world of the nineteenth century and the post-colonial world of the twentieth century. Colonialism and imperialism continue today, but their contemporary form is very different from their nineteenth-century form, just as the Canadian, or more broadly, the Western,⁴ concept of justice in the twentieth century differs in important ways from its nineteenth-century counterpart. Although a thorough analysis of this history is not within the scope of this Essay, it is possible to remark that certain Western notions of justice, such as the liberal idea of individual human rights, expanded to the international arena immediately after the World Wars by means of newly created international instruments. The post-World War generations, whose ambitions and goals are, in theory at least, organized around this new center of belief in equal human rights and justice for *all* rather than uniquely for the civilized or Western world, have a colonial history that we now disavow and therefore feel bound to contend with and to redress.⁵

The demands of Canada's First Nations have only recently become an object of discussion in the context of international law. There are several reasons for this. Those who consider it an imperative of social and legal justice to address the long-standing wrongs perpetuated against First Nations have quite rightly focused on the

the early part of this century that prohibited traditional First Nations languages, religions, and forms of government, and imposed others in their place. See Rarihokwats, *Akwesasne: L'avènement de la 'Démocratie,'* 39 MEDIUM SCIENCES HUMAINES 17 (1991) (discussing such measures imposed upon the First Nations people of Akwasasne). Until the 1970s, the government position on First Nations communities was assimilationist and sought the removal of any mention of them as a distinct people from the Canadian Constitution. See Assembly of First Nations, *The Story of the National Indian Brotherhood and the Assembly of First Nations* (visited April 1, 1997) <<http://www.afn.ca/afnstory.htm>>. Finally, a profound racism existed more or less openly in the 1960s and 1970s. This racism was reflected in media portrayals of First Nations peoples as having one-word vocabularies and, remarkably, in the test pattern of the Canadian Broadcasting Corporation national television network, which displayed an "Indian" in a bulls-eye. That logo was later used by First Nations groups on T-shirts as a form of protest.

3. CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), §35.

4. The term "Western" is used here as a cultural designation rather than as a strictly geographical designation and refers to concepts originating in Europe which later migrated to other parts of the world such as Canada. It is intended to be understood particularly in counterpoint to concepts of justice proper to First Nations peoples. For this reason, as well as for the sake of brevity, First Nations peoples and concepts will be referred to as "non-Western," despite their geographical proximity.

5. See *infra* Part I.A.

avenues that would seem to lead to the most immediate and practical redress. Consequently, authors such as Michael Asch and Patrick Macklem,⁶ as well as Brian Slattery,⁷ have focused on Canadian internal law because the Canadian judicial system, already having expressed a certain willingness towards reform,⁸ can effect change relatively quickly and efficiently.⁹ These authors have provided excellent discussions of the problems and the possibilities in the context of Canadian law. However, while Canadian internal law may indeed be the most practical and immediate forum in which to obtain the recognition and protection of certain rights belonging to First Nations, ultimately it cannot reach the heart of the matter. Underlying all of the particular rights claimed by First Nations is their claim to self-determination or, more extremely, to self-government. Any discussion of self-government within the context of an already sovereign state such as Canada is thus incomplete, and may not be able to offer the self-definition desired without questioning the concept of the sovereign state itself.

In Canada, there are more than six hundred First Nations.¹⁰ First Nations differ in their demands and in the degree and type of self-determination sought. There are some who insist on an absolute sovereignty-territorial integrity and an absolute right to self-government in all its forms.¹¹ Others seek an organized form of self-

6. Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, 29 A. L. REV. 498 (1991).

7. Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727 (1987) [hereinafter Slattery, *Aboriginal Rights*]; see also Brian Slattery, *First Nations and the Constitution: A Question of Trust*, 71 CAN. B. REV. 261 (1992).

8. See discussion of *Calder* and *Guerin* *infra* Part I.A.

9. The following authors provide excellent discussions of the problems and avenues in the context of Canadian law. See Asch & Macklem, *supra* note 6; Slattery, *Aboriginal Rights*, *supra* note 7.

10. Assembly of First Nations, *Description of the Assembly of First Nations* (visited Mar. 26, 1997) <<http://www.afn.ca/afndesc.htm>>.

11. The Iroquois Confederacy, for example, "has historically insisted that it is a sovereign, independent nation in relationship to the Canadian state." PATHWAYS TO SELF-DETERMINATION: CANADIAN INDIANS AND THE CANADIAN STATE 174 (Leroy Little Bear et al. eds., 1984) [hereinafter PATHWAYS]. The Iroquois Confederacy, or the Haudenosaunee, consists of six individual tribes. The Haudenosaunee "have consistently held that they have never ceased to be the same Confederacy that stood equal to France, Britain, and the United States in the 17th and 18th centuries. The claim to such a status . . . is a concept intrinsic to Iroquois identity, tradition, and history." David Schneider & Dr. Louis Fumanski, *The International Personality of Indigenous Peoples: An Account from North America* (visited Mar. 26, 1997) <<http://www.geocities.com/CapitolHill/8366/indian.html>>. Also, certain nations claim that "their forefathers never surrendered their nationhood or right to self-government, nor was it taken from them by conquest. They claim that these rights were usurped surreptitiously by successive British and Canadian governments, in contravention of international law." Leroy Little Bear et al., *Introduction* to PATHWAYS, *supra*, at xv. Members of the Iroquois Confederacy also routinely refuse to be identified as Canadian citizens and have their own passports.

government within the Canadian federal system. What is consistent across First Nations communities in Canada is the demand for a nation-to-nation relationship with Canada,¹² but it is precisely this notion of a nation-to-nation relationship that is problematic and that is properly a question of international law. International law is a suitable tool and optic because it is accustomed to radical change occasioned by historical and practical necessity, specifically with regard to ways of organizing territory in a manner which is more fluid than that of the consensually-based internal law. This may lend itself well to new possibilities.

International law contains the heart of the matter, and therefore perhaps contains greater possibilities, not only for Canada's First Nations but for other peoples as well. The heart of the matter is that First Nations claims for self-government are unacceptable, indeed

12. The particulars and the extent of First Nations' demands for self-government vary widely from nation to nation because each particular struggle is informed by different historical and geopolitical factors. First Nations peoples have confronted Canadian governments both as individual nations and as a united front. Sometimes First Nations demands have been oppositional and very specific in nature in that they were catalyzed as protest to a governmental move. Such was the case of the Mohawks in Québec in 1990, who opposed both the provincial government of Québec and the Canadian federal government over the proposed use of sacred lands for a golf course. Other times they have been united in broader claims for self-government, as when the Assembly of First Nations participated in the constitutional talks leading to the drafting of the Charlottetown Accord (for constitutional amendment). Although the accord failed in the end, it would have gone a long way toward reconciliation between Canada's First Nations and the Canadian government. Among other things, it would have recognized First Nations governments as a third order of government in Canada, alongside the provincial and federal orders of government.

While it is impossible to consider all the various forms of self-government that have been debated, it is useful to analyze that which First Nations demands have in common: the claim to a right of self-government defined as a nation-to-nation relationship with Canada. This type of relationship was embodied in the Charlottetown Accord, which recognized the inherent (rather than delegated) right of First Nations to govern themselves as they see fit, without interference, in all aspects of government (culture, religion, language, education, development, economic activities, law and legal institutions, housing, health, social services, environment, policing, etc.). It is also detailed in the Draft Declaration on the Rights of Indigenous Peoples, U.N. Commission on Human Rights, which has not yet been adopted and which is discussed in greater detail below. Draft Declaration on the Rights of Indigenous Peoples, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2 (1994) [hereinafter Draft Declaration] The Draft Declaration recognizes, among other things, the right of indigenous peoples to freely determine their relationship with States in a spirit of co-existence and their right of self-determination, which includes the right to freely determine their political status. *Id.* at preamble, Art. 3. A nation-to-nation relationship with Canada does not necessarily imply secession and can refer to First Nations self-government within the country of Canada. The majority of First Nations self-government projects seek a form of self-government within Canada. Neither, however, does a nation-to-nation relationship preclude secession, and the arguments advanced by this Essay are not intended to defeat any such claim, but rather to define the grounds upon which it might be argued.

unthinkable, to current international law. One reason for this is because the First Nations essentially demand a degree of sovereignty as a nation rather than as a state,¹³ which is the only subject recognized by international law. They are unacceptable to contemporary states such as Canada, which are subjects of international law, because the recognition of collective rights on the scale of a nation would constitute a breach of the sovereign state in question.

The state, as it exists in current international law, is essentially a Western notion despite its international application, and as such it is not particularly hospitable either to concepts such as the organizational models based on the collective traditionally used by many First Nations or to non-Western concepts in general. It is likely, then, that the obstacles faced by First Nations in their struggle for self-determination are faced by non-Western nations of people around the globe.

Part I.A of this Essay will consider the broader context that surrounds this tension between First Nations' demands for self-government and the interests of the Canadian state, and which will prove to be relevant to its possible resolution. Parts I.B–I.D will identify the nature of First Nations demands, the nature of Canada, and the aspects of conflict between them. The second section of this Essay will discuss the problem in the context of a Western legal tradition considered to be at a critical turning point, that is, at a point where—though public opinion, as well as certain legal instruments,

13. This distinction between *nation* and *state* is discussed in greater detail elsewhere. See discussion *infra* Part I.C. It should be noted that although a defined territory is one of several characteristics of statehood, an attachment to certain lands may or may not also be a characteristic of nationhood. A claim to sovereignty as a nation, then, does not preclude a claim to territory. The Fourth World Documentation Project of the Center for World Indigenous Studies defines a nation as a "self-identifying people who share a common history, often language, a common culture and a homeland." Center for World Indigenous Studies, FWDP—*Definition of Nation* (visited April 2, 1997) <<http://www.halcyon.com/FWDP/nation.html>> [hereinafter *Definition of Nation*]. On the other hand, a state is defined as a "territory built by conquest in which one culture, one set of ideals and one set of laws have been imposed by force or threat over diverse nations." Center for World Indigenous Studies, FWDP—*Definition of State* (visited April 2, 1997) <<http://www.halcyon.com/FWDP/state.html>> [hereinafter *Definition of State*]. While nations are "the most persistent and resistant organization of people-culture," *Definition of Nation, supra*, "[s]tates are ephemeral and originate and disappear with the stroke of a pen," *Definition of State, supra*. My own definition is as follows:

Nation is defined as a community of people, usually but not necessarily installed on a given territory, and which, due to a certain unity, be it historical, linguistic, religious, racial or other, is animated by the desire to live together. It is self-conscious. It voluntarily defines itself as nation. And although it will have some form of political organization or political entity, it may or may not dispose of a state.

accepts the justice of observing the collective right of peoples to self-determination—our legal system seems to be structurally incapable of doing so in this case. This Part of the Essay will also discuss some areas of international law that may offer some possibilities for reform.

I. THE CONTEXT AND THE CONFLICT

A. Historical Context

The recent proliferation of articles and books in support of First Nations demands for self-determination indicates that a large part of public opinion considers these demands just.¹⁴ Recent Canadian jurisprudence, such as *Calder v. Attorney-General of B.C.*¹⁵ and *Guerin v. The Queen*,¹⁶ indicates that the judiciary now also considers that some sort of equitable resolution to the historical wrongs perpetuated by Canada against its First Nations must either be discovered or invented. Patrick Macklem describes the dissent in *Calder* as:

a powerful dissent, concurred in by Spencer and Laskin JJ., in which [Justice Hall] argued that Nishga title was not extinguished by colonial proclamations and legislative enactments. Reacting against the tenor of historical documentation which imagined native people to be "in effect a subhuman species," Justice Hall sought to expand the nature of the Indian proprietary interests within the confines established by *St. Catherine's Milling* and the *Marshall* trilogy. Rather than claiming the source of the native

14. In addition to the authors cited in this Essay, see FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975); RÉMI SAVARD & JEAN-RENÉ PROULX, *CANADA: DERRIÈRE L'ÉPOPÉE, LES AUTOCHTONES* (1982); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

15. *Calder v. Attorney-General of B.C.* [1973] S.C.R. 313 (Can.). The *Calder* opinion established the survival of aboriginal rights with respect to land. The Court held that the Nishga peoples possessed aboriginal rights to their lands that had survived European settlement. The Court was divided, however, on the question of whether or not the rights had been validly extinguished. The recognition of this right was nonetheless significant enough for the federal government to begin treaty negotiations concerning regions of Canada not yet subject to treaties. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* §27.5(b) (3rd ed. 1992) (discussing the recognition of aboriginal rights in the *Calder* opinion).

16. *Guerin v. The Queen* [1984] 2 S.C.R. 335 (Can.). The *Guerin* opinion concerned land surrendered to the Crown by the Musqueam Indian Band so that it could be leased by the Crown to a golf club, and which the Crown leased on terms less favorable than those stipulated by the Band. The Court recognized the Band's aboriginal title to the lands, which it described as "a legal right derived from the Indians' historic occupation and possession of their tribal lands." *Id.* at 376.

interest to be the *Royal Proclamation*, . . . Hall J. rooted the native interest in the common law of property and invoked the common law principle that "[p]ossession is of itself at common law proof of ownership."¹⁷

In *Guerin*, considered to be a landmark case, the Supreme Court of Canada affirmed that the Crown had a fiduciary obligation towards the Musqueam Indian Band and established that this fiduciary obligation is governed by the principle of equity, which is subject to judicial review.¹⁸

Section 35(1) of the Constitution Act of 1982 recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada."¹⁹ However, these recent developments reflect a radical change in perspective with respect to First Nations' rights. Canada's colonial and imperialist history and origins dispossessed First Nations peoples of their land and, to some extent, of their culture because European interests did not consider them to be civilized human beings equal to themselves and having the right to equal respect. A papal bull of 1537, the *Sublimis Deus* of Paul III, affirmed that "the right of discovery could not be invoked in cases where the lands in question were already inhabited."²⁰ The categorization of the people then inhabiting North America as uncivilized groups who did not farm the land but roamed it "erratically" in search of game and fish, allowed the Europeans to convince themselves that the lands were not "really" inhabited and were therefore appropriable by the "discoverer."²¹ This perspective is now disa-

17. Patrick Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, 2 MCGILL L.J. 382, 409 (1991) (quoting *Calder* [1973] S.C.R. at 368 (Hall, J., dissenting) (citations omitted)).

18. *Guerin* [1984] 2 S.C.R. at 348-53.

19. CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), §35(1).

20. SAVARD & PROULX, *supra* note 14, at 20 (translation mine) (quoting the *Sublimis Deus* of Paul III). Theologians in Europe, such as Francisco de Vitoria (1480-1546), were some of the first scholars to explore the legal relationship between First Nations and the European colonists. See Schneider & Furmanski, *supra* note 11.

21. SAVARD & PROULX, *supra* note 14, at 26. The theologian Francisco de Vitoria eventually justified European conquest of North America as follows: "Although these barbarians are not altogether mad . . . they are not far from being so They are not, or are no longer, capable of governing themselves any more than madmen or even wild beasts and animals" Schneider & Furmanski, *supra* note 11, at 3. Henry J. Steiner and Philip Alston note:

During and following the period of colonization of the Americas, international law justified in many respects the conduct (civilizing mission) of the European states, effectively legitimating colonization and subjugation while demeaning the culture, religious beliefs and achievements of the conquered or hostile native peoples. Civilization and Christianity stood against paganism and barbarism. Although these beliefs and doctrines were moderated, indigenous

vowed and has been replaced by an internationalized concept of individual human rights that theoretically applies to *all*, without exception.

An important catalyst to this change of opinion is found in the first half of this century, at a time of industrial, trade, and communications expansion that brought the European states, in their expanded colonial forms, into closer contact, and during which two world wars were fought. The post-war world was a very different one. The international society of states remained very politically and economically interrelated and interdependent as a result of, among other things, rapidly increasing international trade. This was even more the case for the European and North American community of states, which were necessarily united in the Cold War. Moreover, because this community recognized its capacity for global war; it took steps to assure international peace and security, as well as the preferred balance of power, via international organizations and treaties. The Charter of the United Nations, adopted in 1945 at the close of World War II, states:

We [t]he [p]eoples of [t]he United Nations [d]etermined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . [a]nd for [t]hese [e]nds . . . to unite our strength to maintain international peace and security . . .²²

Article 1 of the U.N. Charter lists the United Nations' objectives, which include "achiev[ing] international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all,"²³ and "[t]o be a centre for harmonizing the actions of nations in the attainment of these common ends."²⁴ The U.N. Charter's strategy for the maintenance of international peace is the international privileging and protection of fundamental and individual human rights. While the advent of individual human rights constituted a certain breach of the sovereignty of states by subjecting them to the surveillance of international organizations, it is arguable

peoples did not start to become a significant protected category under international law until the start of the human rights movement.

HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1007 (1996).

22. U.N. CHARTER preamble.

23. *Id.* at art. 1, para. 3.

24. *Id.* at art. 1, para. 4.

that this strategy of focusing on individual rights was acceptable to the member states because it only obliquely affects their sovereignty.

In 1948, shortly after the adoption of the Charter, the U.N. adopted the Universal Declaration of Human Rights,²⁵ which precipitated the International Covenant on Civil and Political Rights²⁶ and the two Optional Protocols to that Covenant.²⁷ Professors of international law Jacques-Yvan Morin, Francis Rigaldies, and Daniel Turp have this to say of the Universal Declaration of Human Rights: "The normative explosion in the domain of human rights can be attributed to the [Universal Declaration of Human Rights], which constituted the first attempt to enumerate and to formulate fundamental human rights in terms universally acceptable."²⁸

International instruments also eventually recognized certain limited collective rights and a limited right of peoples to self-determination.²⁹ The International Covenant on Civil and Political

25. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

26. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

27. Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 302; the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, July 11, 1991, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, U.N. Doc. A/44/49. See JACQUES-YVAN MORIN ET AL., DROIT INTERNATIONAL PUBLIC: NOTES ET DOCUMENTS 489 (1987) (discussing the international recognition of human rights through adoption of these covenants).

28. *Id.* (translation mine). Hurst Hannum notes:

The "principle" of self-determination is mentioned only twice in the 1945 Charter of the United Nations, both times in the limiting context of developing "friendly relations among nations" and in conjunction with the principle of "equal rights . . . of peoples."

Neither self-determination nor minority rights is mentioned in the 1948 Universal Declaration of Human Rights, although the Declaration does contain a preambular reference to developing amicable international relations. Whatever its political significance, the principle of self-determination had not attained the status of a rule of international law by the time of the drafting of the United Nations Charter or in the early United Nations era.

Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 11-12 (1993).

29. The United Nations' 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples affirms that "[a]ll peoples have the right to self-determination [and that] by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at para. 2, U.N. Doc. A/L.323 and Add. 1-6 [hereinafter Declaration on Colonial Independence]. The Declaration on Colonial Independence, however, limits this right to self-determination by stating that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the *Charter of the United Nations*." *Id.* at para. 6. The Declaration on Colonial Independence also

Rights ("ICCPR") was one of the first international instruments to affirm not only the right of self-determination of peoples, but also certain collective rights of minorities. While recognizing equal human rights for all persons in its preamble, it also affirms that:

All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

. . . .

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall

gave rise to uncertainties regarding the meaning of terms such as "people," "territories," and "countries."

The later Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 29, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations], addressed some of these uncertainties. Hannum, *supra* note 28, at 13-14. The Declaration on Friendly Relations affirmed the right of peoples to freely determine their political status without external interference and it recognized that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people." Declaration on Friendly Relations, *supra*, at 124. However, the Declaration on Friendly Relations does not offer a definition of the term "peoples" and it also contains a limitation on the right to self-determination when it states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

. . . .

All States enjoy sovereign equality . . . [which provides that] territorial integrity and political independence of the State are inviolable [and that] [e]ach State has the right freely to choose and develop its political, social, economic and cultural systems

Id. In order to be "in compliance with the principle of equal rights and self-determination of peoples" and thus to benefit from the limit on self-determination, a state probably need only "represent 'the whole people.'" Hannum, *supra* note 28, at 17 (quoting Declaration on Friendly Relations, *supra*, at 124). In other words, a state will be representative insofar as it does not formally exclude a particular group from participation in the political process on the basis of that group's race, creed or color. *Id.* In practical terms, then, insofar as the state does not formally exclude participation by First Nations peoples in its democratic political processes, it may profit from the limitation on self-determination and is thus entitled to its territorial integrity and political independence. The relationship between the state and its First Nations would therefore remain more or less a matter of domestic law.

not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.³⁰

Thus, the post-war period saw a flurry of activity seeking international consensus on human rights issues. These international instruments indicated a significant change in concepts of justice taking place, not only in their recognition of *individual* human rights to all without exception (as opposed to the colonialist position that "uncivilized" nations such as the peoples of the Americas were too inhuman to invoke, for example, the "already occupied" obstacle to the "right of discovery" principle³¹), but also in their attempts to formulate the necessarily collective right of self-determination of *minorities* and *peoples* within the territory of a sovereign state.

While a certain consensus regarding individual human rights was possible, however, the question of a collective right of self-determination remained problematic. It has been argued, for example, that the ICCPR gives entirely discrete rights to *minorities* on the one hand (such as cultural, linguistic, and religious rights) and to *peoples* on the other (such as the right of self-determination). Moreover, because "minorities" are not "peoples" they are not entitled to the right of self-determination; that right properly belongs to *peoples* in the sense of the *peoples* of a state in their entirety.³² Furthermore, the ICCPR protects *persons belonging to minorities* rather than minorities themselves, thus suggesting that even the rights ascribed to minorities are not so much collective as individual rights,³³ and that these rights shall not prejudice the sovereignty and territorial integrity of a state.³⁴ These same problems were also present in the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities of 1992,³⁵ which affirmed the right of persons belonging to minorities to enjoy their own culture,

30. ICCPR, *supra* note 26, at arts. 1, 27.

31. See *supra* text accompanying notes 19–21.

32. See Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession*, Comments, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29, 32 (Catherine Brölmann et al. eds., 1993).

33. STEINER & ALSTON, *supra* note 21, at 992.

34. General Comment No. 23 on Article 27 of the Covenant, para. 3.2, International Covenant on Civil and Political Rights Committee on Human Rights, CCPR/C/21/Rev.1/Add. 5 (Apr. 24, 1994) (cited in STEINER & ALSTON, *supra* note 21, at 992).

35. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/135 (1992) [hereinafter Declaration on the Rights of Minorities]; see STEINER & ALSTON, *supra* note 21, at 987.

religion, and language,³⁶ except insofar as specific practices were in violation of national law and contrary to international standards,³⁷ and which affirmed that these rights may be exercised individually as well as in community.³⁸ Again, self-determination rights are limited by an affirmation of the sovereign equality, territorial integrity, and political independence of states.³⁹

Given this tendency to restrict human rights to individual rights overseen by the unchallenged sovereign state,⁴⁰ First Nations peoples have consistently lobbied for a status in international law distinct from that of either individuals or minorities.⁴¹ They have

36. Declaration on the Rights of Minorities, *supra* note 35, at art. 2.

37. *Id.* at art. 4.

38. *Id.* at art. 3.

39. *Id.* at art. 8.

40. Miguel Martinez, Special Rapporteur to the U.N., criticizes the ICCPR, the Optional Protocols, and the Declaration on the Rights of Minorities because:

the rights they acknowledge and the protection they accord are, in the strict sense, applicable only to members of such groups as individuals, not to the group as such and considered in its entirety. . . despite . . . certain references to minorities as entities considered as a whole.

In other words, the prevalent notion in those texts is one of individual rights as the focus for possible international concern over human rights, as has been fashionable in the United Nations since the groundwork was laid down in the Universal Declaration of Human Rights in 1948.

UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST INDIGENOUS PEOPLES: STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS: SECOND PROGRESS REPORT SUBMITTED BY MR. MIGUEL ALFONSO MARTINEZ, SPECIAL RAPPORTEUR, U.N. Doc. E/GN.4/Sub.2/1995/27 at paras. 78-79 (1995).

Henry J. Steiner and Philip Alston remark that most rights in the human rights instruments have an individual character, even though many of them are at the same time germane to the formation of groups, such as the right of association. STEINER & ALSTON, *supra* note 21, at 993. They also note that the nature of a right to an autonomy regime would then have a markedly different character even from individual rights that have some collective or group association, since "[a]utonomy rights are unmistakably collective in the sense that they can be exercised only by the group—by its spokespersons or representatives, however they are selected—and cannot be reduced to or expressed through the rights of its members." *Id.*

41. Stephen Marquardt notes:

Many minorities are to greater or lesser degrees integrated into the population of the State in which they live and do not object to being treated as national citizens. As reflected in the rights protected under the [Declaration on the Rights of Minorities], minorities often seek only to practice their own religion, language, or culture. . . .

sought to establish that they are "members of the international community who have a legal personality under international law—*subjects* of international legal rights and duties rather than mere *objects* of international concern."⁴² To these ends, both the Convention Concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization,⁴³ which became effective in 1991, and the Draft Declaration on the Rights of Indigenous Peoples,⁴⁴ still under discussion, specifically concern indigenous peoples. The ILO Convention protects indigenous languages, religions, cultures and values⁴⁵ in so far as they are not incompatible with the legal system of the state or with international law.⁴⁶ It uses the term *peoples*, but affirms that its use "shall not be construed as having any implication as regards the rights which may attach to the term under international law."⁴⁷ The ILO Convention imposes very few obligations on governments, such as an obligation to consult indigenous peoples regarding governmental measures that may affect them. It does not guarantee any particular form of participation and it gives no effective rights of autonomy.⁴⁸ The Draft Declaration, on the other hand, if adopted, will recognize the inherent rights of indigenous peoples,⁴⁹ their right to freely de-

from minorities is their ancestral, "pre-colonial" link to the territory, which is not the case for most minorities. Furthermore, indigenous peoples in most cases seek some form of political autonomy on the ground of their separate identity. . . . Most Indian and Inuit peoples also categorically reject classification as Canadian or US citizens and claim their own nationality.

Stephen Marquardt, *International Law and Indigenous Peoples*, 3 INT'L J. GROUP RTS. 47, 70 (1995).

42. Russel Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 35 (1994) (emphasis added).

43. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169 (June 27, 1989) [hereinafter ILO Convention]; see STEINER & ALSTON, *supra* note 21, at 1008.

44. Draft Declaration, *supra* note 12.

45. ILO Convention, *supra* note 43, at preamble, arts. 4, 5.

46. *Id.* at art. 8.

47. STEINER & ALSTON, *supra* note 21, at 1008 (citing ILO Convention, *supra* note 43, at art. 1). Note that under international law, *peoples* have a right to self-determination recognized by instruments such as the ICCPR. See ICCPR, *supra* note 26, at art. 1.

48. STEINER & ALSTON, *supra* note 21, at 1008. The Canadian government, for example, in the guise of consulting First Nations peoples regarding governmental measures that may affect them, "customarily will mail letters to the chiefs, notifying them of new administrative or legislative changes, often without allowing them enough time to conduct an appropriate and thorough analysis of these changes. If the chiefs do not answer these letters within a certain limit, the government proceeds. When we complain about these changes, we are told that the letter itself was the only form of consultation." Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, in 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 58 (1989).

49. Draft Declaration, *supra* note 12, at preamble.

termine their relationship with States in a spirit of coexistence, mutual benefit and full respect,⁵⁰ their right to freely determine their political status,⁵¹ and that governments must obtain their consent before enacting measures that may affect them.⁵² It also foresees that, as a specific form of exercise of their right to self-determination, indigenous peoples have a right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.⁵³ The final version of the Draft Declaration is, however, a long ways off, and state governments, including the Canadian government, have expressed their reluctance to apply the international meaning of the words *self-determination*, *self-government*, *territory*, and *peoples* to indigenous peoples, preferring that questions concerning indigenous peoples remain a domestic issue.⁵⁴ It would seem, then, that the construction of a group of international instruments which newly expanded the principles of equal individual human rights (including certain rights of persons belonging to minorities) to an international level was possible because the international community of states considers that the surveillance of the rights of isolated individuals within their boundaries by international organizations such as the United Nations does not constitute a dangerous breach of their sovereignty, as might international recognition of a people's right of self-government.⁵⁵

With this nonetheless newly expanded notion of justice, then, we have a wretched history to redress. In pursuit of this objective, we must now identify the nature of First Nations demands, we must identify Canada, and we must identify the conflicts between them.

B. Identifying First Nations' Self-Government

Canada's First Nations' demands for self-government are foremost demands for self-determination and a nation-to-nation re-

50. *Id.*

51. *Id.* at art. 3.

52. *Id.* at art. 20.

53. *Id.* at art. 31.

54. Rudolph C. Ryser, *Indian Nations and United States Debate Self-Determination and Self-Government at the United Nations* (visited Mar. 26, 1997) <<http://www.halcyon.com/pub/FWDP/International/unwgip93.txt>>.

55. The use of the term "peoples" here is synonymous with "nation," see discussion *supra* note 13, as opposed to Rosalyn Higgins' sense of the term as being synonymous with "the peoples of a state in their entirety," see *supra* text accompanying note 32.

lationship with Canada. Although there are differing opinions about which form this could take,⁵⁶ it seems that what is sought is a distinctly non-Western model of organization which operates in accordance with traditional principles. One such traditional principle which will prove to be extremely difficult to accommodate, is that of the privileging of the collective over the individual. This emphasis on the collective rather than the individual is evident in the consensual system of organization, as well as in the First Nations concept of ownership and property. In discussing these ambitions, the words of First Nations peoples themselves will be used as much as possible, as would seem to be appropriate.

Traditional Indian government, according to Marie Smallface Marule, is "of the people, by the people, for the people."⁵⁷ According to her, emphasis is placed on the collective will.⁵⁸ Menno Boldt and J. Anthony Long state:

in Indian tribal society individual self-interest was inextricably intertwined with tribal interests; that is, the general good and the individual good were virtually identical. . . .

Indians traditionally defined themselves communally, based on a spiritual compact rather than a social contract. The tribal will constituted a vital spiritual principle which for most tribes gained expression in sharing and co-operation rather than private property and competition.⁵⁹

The 1876 Indian Act,⁶⁰ for example, met with broad resistance against the obvious intent to assimilate via, among other things, provisions that deliberately encouraged individual property rights on reserves.⁶¹ Leroy Little Bear submits that:

Indian ownership of property, like Indians' way of relating to the world, is holistic. Land is communally owned; ownership rests not in any one individual, but rather belongs to the tribe as a whole, as an entity. The members of a tribe have an undivided interest in the land; everybody, as a whole, owns the whole. Furthermore, the land belongs not

56. See discussion *supra* note 12.

57. Marie Smallface Marule, *Traditional Indian Government: Of the People, by the People, for the People*, in *PATHWAYS*, *supra* note 11, at 36, 36.

58. *Id.*

59. Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, in *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 333, 336 (Menno Boldt & J. Anthony Long eds., 1985).

60. The Indian Act, 1876, ch. 18, S.C. 1876 (Can.).

61. Little Bear et al., *supra* note 11, at xii.

only to people presently living, but also to past generations and future generations. . . . In addition, the land belongs not only to human beings, but also to other living things (the plants and animals and sometimes even the rocks); they, too, have an interest.⁶²

Within this perspective, though, "there still prevailed a respect for individual autonomy and freedom . . . probably best exemplified by the absence in traditional Indian political thought of hierarchical authority Respect for the individual also found expression in decision-making by consensus."⁶³ The elective system provisioned in the 1876 Indian Act was another ground of resistance, because of its hierarchical authority structure and majority rule which encouraged factionalism.⁶⁴ "As soon as you begin to short-cut, you begin to detract from the complete thought and the process for its achievement. This process works through discussion until consensus is reached"⁶⁵ This way of thinking about the collective and the individual's place within it, and about the collective in relation to its larger environment as is seen in the concept of ownership, is part of a cosmogony common to many First Nations, where "all life is considered equal, [and therefore] we are no more or no less than anything else."⁶⁶

C. Identifying Canada

Canada is not something that is usually considered in need of identification. For the purposes of this Essay, however, it is worthwhile to remark that it is a state, subject of international law. In international law, a state exists "when a community acquires, with a reasonable probability of permanence, the essential characteristics of a state, namely an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations."⁶⁷ A cornerstone of the state in current international law is the concept of

62. Macklem, *supra* note 17, at 396 (quoting Leroy Little Bear, *Aboriginal Rights and the Canadian "Grundnorm,"* in ARDUOUS JOURNEY: CANADIAN INDIANS AND DE-COLONIZATION 243, 245 (1986)).

63. Little Bear et al, *Introduction to Chapter One, Cultural and Ideological Foundations,* in PATHWAYS, *supra* note 11, at 3.

64. Little Bear et al, *Introduction to PATHWAYS,* *supra* note 11, at xii.

65. Oren Lyons, *Spirituality, Equality and Natural Law,* in PATHWAYS, *supra* note 11, at 5, 5.

66. *Id.* at 6.

67. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 137 (1963).

sovereignty. One of the first formulations of sovereignty was by Bodin, who thought that:

a confusion of uncoordinated independent authorities must be fatal to a state, and that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty . . . is the power to make the laws . . . , and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes⁶⁸

Menno Boldt and J. Anthony Long further elucidate the concept:

Bodin and Hobbes wrote of sovereignty as if it were equivalent to absolute and perpetual authority derived from either God or the people. For Locke and Rousseau sovereignty arose from absolute authority derived from the voluntary agreement of independent wills (contract of association) delegating their authority to the government, the fiduciary sovereign. Common to both of these conceptions of sovereignty, and generally implied in all European-western concepts of sovereignty, is a principle of authority defined as the supreme, if not the absolute and inalienable, power of the ruling entity to make decisions and to enforce them, if necessary, through sanctions or coercion. Invariably linked with this principle of authority is the idea of hierarchy of power relationships.⁶⁹

This sovereign authority has two main objects: its territory and its population. Brierly describes territorial sovereignty as:

bear[ing] an obvious resemblance to ownership in private law, less marked, however, today than it was in the days of the patrimonial state, when a kingdom and everything in it was regarded as being to the king very much what a landed estate was to its owner. As a result of this resemblance early international law borrowed the Roman rules for the acquisition of property and adapted them to the acquisition of territory, and these rules are still the foundation of the law on the subject.⁷⁰

For example, the assumption of Crown title over all Canadian lands is the foundation of Canadian property law. The assumption of

68. *Id.* at 8–9.

69. Boldt & Long, *supra* note 59, at 335.

70. BRIERLY, *supra* note 67, at 162.

Crown title is based upon the idea that all lands belong to some titleholder, that such a title is by definition absolute and that "[a]n absolute title to lands cannot exist, at the same time, in different persons, or in different governments."⁷¹ In *Johnson v. M'Intosh*,⁷² to use Patrick Macklem's precis, the international law doctrine of discovery and the concept of Crown prerogative were used to support the conclusion that underlying title vests with the state and that the native interest in the land is one of occupancy only.⁷³

The exercise of this sovereign authority over a population is not clearly distinguishable from its territorial pretensions.

Modern states are territorial; their governments exercise control over persons and things within their frontiers, and today the whole of the habitable world is divided between about a hundred of these territorial states.

....

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises . . . jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind . . . it is popularly said to have "sovereignty" over the territory.⁷⁴

The state maintains its sovereign authority over its population by objectifying them as property that is territorially bounded and by simultaneously treating them as a mass of so many isolated individuals whose only unity resides with the state. More specifically:

All persons have equal rights in law as individuals, and their membership in one or another racial or political group is irrelevant to their voting rights, civil rights, and eligibility to receive government benefits, services, and protections. Group rights per se do not exist. For example, French Canadians do not have special linguistic rights in Canada; rather, every Canadian has the right to practise the official language of his or her choice. The very concept

71. Macklem, *supra* note 17, at 402 (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823)).

72. 21 U.S. (8 Wheat.) 543 (1823).

73. Macklem, *supra* note 17, at 398.

74. BRIERLY, *supra* note 67, at 126, 162.

of special rights for one or another racial or political group is abhorrent to the small-l liberal ideology⁷⁵

The Canadian state, then, is an absolute and territorial authority which considers itself as having title to all things falling within its territory, including its population, whose only group allegiance can be to the state.

D. Borders in Conflict

There are at least two fundamental conflicts between these two perspectives: the privileging of the collective versus the privileging of the individual, and their very different notions of territory. These two conflicts are not unrelated, however, and they can both be at least partially attributed to the fact that Canada is a state in the sense of current international law, while First Nations are not. The doctrine of sovereignty as it currently exists in international law is fundamentally irreconcilable with some of the First Nations' most cherished principles:

The European-western notion of a sovereign authority has its origin in the system of feudalism and the associated belief in the inherent inequality of men. The indigenous peoples of North America, however, never experienced feudalism, and most believed in the equality of men. In the Hobbesian doctrine of sovereignty, authority was deemed necessary to protect society against rampant individual self-interest.⁷⁶

If, however, First Nations self-interests are indivisible by definition, then they should have no need of this protection.⁷⁷ It follows that they also have no need of and reject the imposed structure of hierarchical political authority which the state represents, since traditional principles reject the "separation of authority from the community."⁷⁸

75. J. Rick Ponting & Roger Gibbins, *Thorns in the Bed of Roses: A Socio-Political View of the Problems of Indian Government*, in *PATHWAYS*, *supra* note 11, at 122, 133.

76. Boldt & Long, *supra* note 59, at 336.

77. See *supra* text accompanying notes 57–59, 62.

78. Boldt & Long, *supra* note 59, at 340. It is important to forestall romanticized impressions of an idyllic and unified body politic. It is not the intention of this Essay to portray First Nations communities as communities without internal political strife or conflicts and challenges of authority, but rather as communities in which authority is defined differently and whose internal disputes and the means of resolving them will likewise be different. For example, in some First Nations communities there are conflicts of legitimacy between elected members of the band council (a system instituted by The Indian Act, 1876, ch. 18, S.C. 1876 (Can.), which prohibited traditional forms of

In Europe, even after the Enlightenment era, it was not authority per se that came under question, but rather who should exercise authority. New, more humane arrangements for exercising authority were devised, including election and delegation. Most Indian tribes, however, did not accept that any man or agency had the inherent or transferred right to govern others, even in the service of the tribal good. The people ruled collectively, exercising authority as one body with undivided power, performing all functions of government. The tribe was not the result of a contract among individuals or between ruler(s) and ruled, but of a divine creation. No human being was deemed to have control over the life of another. Therefore, the authority to rule could not be delegated to any one member or subset of members of the tribal group. This denial of personal authority extended even to the notion of transferring the right to govern within specified fixed limits. Any arrangement that would separate the people from their fundamental, natural, and inalienable right to govern themselves directly was deemed illegitimate.⁷⁹

The political and social experiences and history "that would allow Indians to conceive of authority in European-western terms simply did not exist, nor can sovereign authority be reconciled with the traditional beliefs and values that they want to retain."⁸⁰ Prior to colonization, First Nations operated as independent, stateless nations not having a derived, delegated, or transferred right, but one that came into existence with the group itself.⁸¹

If authority is located in the community, then there can be no state. Under international law, however, "[t]he basic unit . . . is not

government) and the traditional leaders. Such communities are of divided allegiances. See discussion *supra* note 2; *supra* text accompanying note 64.

Another such example is *Native Women's Ass'n of Can. v. Canada* [1994] 3 S.C.R. 627 (Can.). In this case, the Native Women's Association of Canada (NWA) claimed, among other things, that by funding the participation of four *male-dominated* First Nations groups in the constitutional conferences leading up to the *Charlottetown Accord* and by excluding the NWA from direct funding for such participation, the federal government infringed upon their freedom of expression. The NWA felt that the position of these First Nations groups in the constitutional talks might not be as pro-Charter as their own. The NWA wanted the Canadian Charter of Rights and Freedoms, Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) to be made applicable to any form of First Nations self-government that might be negotiated at these talks so as to preserve the constitutional protection of their equality rights. The Supreme Court held that there was no infringement of their freedom of expression.

79. Boldt & Long, *supra* note 59, at 337.

80. *Id.*

81. *Id.* at 340.

the nation but the state.”⁸² It then becomes apparent that an essential obstacle to Canada and the First Nations coming to an equitable solution is that First Nations demands are profoundly unacceptable not only to Canada, but to the wider context which defines Canada, that is, to international law.

International law, despite its appellation, is essentially a Western concept. “[I]nternational law is modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the Renaissance and the Reformation.”⁸³ The modern state system developed by defeating all other contesting forms of authority, such as feudal loyalties and the authority of the church.⁸⁴ The state “declared the determination of the civil authority to be supreme in its own territory.”⁸⁵ This new organization brought an end to the unity that had existed among states by virtue of a common Christianity.⁸⁶ Machiavelli’s *Prince* described a “conception of the state as an entity entirely self-sufficing and non-moral.”⁸⁷ However, other factors such as expanded commerce and the common intellectual background fostered by the Renaissance, brought the European states “into more intimate and constant relations with one another.”⁸⁸

All these causes co-operated to make it certain that . . . in the modern world as in the medieval world it would be necessary to recognize the existence of a wider unity. The rise of international law was the recognition of this truth. It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a number of states, secular, national, and territorial⁸⁹

It was from this new kind of European state that the doctrine of sovereignty developed as a new theory of the nature of states.⁹⁰ This doctrine reached its modern form in the nineteenth century, when the state “gave expression in theory to the growing strength and exclusiveness of the sentiment of nationality during the nineteenth

82. John D. Whyte, *Indian Self-Government: A Legal Analysis*, in *PATHWAYS*, *supra* note 11, at 101, 103.

83. BRIERLY, *supra* note 67, at 1.

84. *Id.* at 3-4.

85. *Id.* at 5.

86. *Id.*

87. *Id.* at 6.

88. *Id.*

89. *Id.* at 6-7.

90. *Id.* at 7.

the state "gave expression in theory to the growing strength and exclusiveness of the sentiment of nationality during the nineteenth century."⁹¹ The nationalism of the European states in the pre-war era was the foundation of the doctrine of sovereignty as absolute and impersonal authority vested in the *person* of the state and it is a cornerstone concept in international law. Indeed, international law developed as a necessary response to the problem of this concept of sovereignty in situations where events were necessitating a certain amount of cooperation between states.⁹² And yet the doctrine of sovereignty is a Western concept. The system of international law eventually expanded, especially in the post-World War era, beyond the European states, and now it is a world-wide system that governs nations which had no part in its construction. More importantly, despite its territorial expansion to an international scope, the doctrine of sovereignty remains fundamentally a Western concept. International rules relating to territory are still in essence the Roman rules of property, and rights over territory resemble the individual ownership of property.⁹³ Furthermore, the post-war adoption of international instruments regarding individual human rights is also the expansion of fundamentally Western concepts.

II. THE RECONCILIATION

The search for solutions or alternatives takes place in the context of a Western legal tradition that is at a critical point in its history, where it must either rise to the challenge or be radically reformed. The arrival of this critical point is apparent in that both public and judicial opinions generally accept the validity of First Nations' claims for redress of Canada's colonial past and, to a certain extent, for their right to self-determination.⁹⁴ This crisis is also apparent in the recent rise of demands for the right to self-determination by many peoples—in addition to the First Na-

91. *Id.* at 15–16.

92. Christian Tomuschat remarks that:

international law, although requiring compliance by States which are its main addressees, is a creation by those same States which, through its rules, seek to guarantee stability in their mutual relations. If on the contrary international law should aspire critically to assess the *raison d'être* of States, including judgments to the effect that a State must disintegrate, it would become an instrument of revolutionary change, almost the opposite of a legal rule.

Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION 1, 4 (Christian Tomuschat ed., 1993).

93. BRIERLY, *supra* note 67, at 20.

94. See *Guerin v. The Queen* [1984] 2 S.C.R. 335 (Can.); *Calder v. Attorney-General of B.C.* [1973] S.C.R. 313 (Can.); see also discussion *supra* Part I.A.

the organization of the state within whose territory they happen to fall.

Consistent with that position, public opinion now rejects Western colonialism and is becoming aware of the need for international cooperation in order to solve new problems of global scale, such as controlling pollution and the sustainable management of resources. Although the post-war efforts towards international cooperation have been characterized as a new form of Western colonialism, it may also be that it is extremely difficult to think beyond one's own cultural paradigms. Nonetheless, our legal system, the system of *rendering justice* that we have developed, appears to be structurally incapable of rendering justice as we now conceive of it—and therein lies its crisis.

A basic principle of international law is the concept of sovereignty, yet the concept of sovereignty developed out of European nationalism. It may not be particularly relevant elsewhere, such as in other parts of the world or to non-Western concepts of organization. Neither is it particularly relevant to an era of necessary international cooperation. The doctrine of sovereignty stands as an obstacle to the self-determination of non-Western peoples such as the First Nations because it requires the people within the territory of the state to have no allegiance apart from the state, with the state being the source of absolute authority and of absolute definition. Consequently, it treats its population as discrete individuals rather than as collective entities. It is true that in recent times, states such as Canada have been trying to grapple with the organized recognition of certain collective rights within and under the jurisdiction of their sovereignty, such as the rights of individuals who are members of minorities; nevertheless, these states still refuse to allow collective self-determination in any substantial way. Even the Draft Declaration on the Rights of Indigenous Peoples,⁹⁵ should it be adopted in its present form, is far from the recognition of a right of self-government for stateless nations. For example, First Nations groups are concerned that Article 31 of the Draft Declaration, detailing specific rights of self-government over local and internal matters, could prove to be too limiting.⁹⁶ Furthermore, the Draft Declaration contains limits on the right of self-determination. It states that indigenous peoples have the right to maintain their institutional structures and their juridical traditions and practices, in accordance with internationally recognized human rights standards.⁹⁷ It further states that “[n]othing in

95. Draft Declaration, *supra* note 12.

96. *Statement by the Confederacy of Treaty Six First Nations* (visited Mar. 26, 1997) <<http://www.halcyon.com/pub/FWDP/Americas/treaty6.txt>>; see also discussion *supra* Part I.A.

97. Draft Declaration, *supra* note 12, at art. 33.

this Declaration may be interpreted as implying for any State, group or person any right to engage in any activities or to perform any act contrary to the Charter of the United Nations.⁹⁸ The Charter of the United Nations, in turn, affirms the sovereign equality of all its Members and provides that all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.⁹⁹

These problems are the result of an inherent contradiction that underpins the Draft Declaration and other international instruments of its kind: that the state cannot recognize a large-scale and stateless collective right to self-determination. The state cannot recognize First Nations as *nations* (or *peoples*), although that is what they are, because to do so would constitute a very grave breach of territorial sovereignty. Insofar as the doctrine of sovereignty precludes the recognition of non-Western forms of collective organization—that is, forms other than the state—its international application is a form of colonialism; it thus obstructs the advent of real international cooperation to replace Western colonialism. Furthermore, the doctrine of territorial sovereignty is antithetical to international cooperation in that it considers the state, as defined by its frontiers, to be utterly separate and responsible to none and as tolerating, in theory, no interference.

It is, however, precisely this doctrine of sovereignty that holds some possibility for a Western legal tradition in need of adaptation. The doctrine of sovereignty, developed as a logical extension of European nineteenth-century nationalism, has created a fundamental problem of international law. Because there is no authority higher than that of the state, international law is necessarily consensual and without sanction, not unlike the First Nations traditions of political organization, which operate on the principle of undivided collective self-interest.¹⁰⁰

A part of the crisis currently faced by the Western legal tradition is the result of the growing realization in the Western world, as well as elsewhere, of the need to find global solutions to new global problems. To this end, international accords such as the Convention on International Civil Aviation (1944),¹⁰¹ the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies

98. *Id.* at art. 45.

99. U.N. CHARTER art. 2, paras. 1, 4.

100. See discussion *supra* Part I.B.

101. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

(1967),¹⁰² the United Nations Convention on the Law of the Sea (1982),¹⁰³ and The Antarctic Treaty (1959)¹⁰⁴ have been created. All of these are distinctly territorial in preoccupation and represent fairly radical reconceptualizations of territory, occasioned by historical necessity. All contain the possibility of serious breaches of state sovereignties. Also, the international accords concerning human rights discussed above, which give a power of surveillance and even interference in some circumstances to international organizations, contain the possibility of a breach of state sovereignties. Since these international accords concern individuals and minorities only, ensuing contraventions of sovereignty can be predicted to be slight. Nonetheless, the fact that all of these potential contraventions of sovereignty are tolerated is further evidence that international law is moving towards a realization of undivided self-interest in international cooperation and towards the redressing of its colonialist past.

These are hopeful signs, but the Western legal tradition must reform itself further still. A significant first step it must take in furthering this reform and thereby redressing its colonialist past is by ceasing contemporary colonialist practices and attitudes, including those that are unintended. This means allowing and encouraging the internationalization, in some meaningful sense of the word, of international law and of the international organizations. As it is difficult to think beyond our own logic, the best means of accomplishing this is to make room in international law for non-Western concepts and to allow their presence to contribute to its shape. More specifically, one can recognize as political entities collectives, groups, peoples, or nations who define themselves in accordance with their own criteria and principles. Such recognition can occur either in place of, alongside of, or within this concept of the sovereign state. Moreover, these non-Western political entities can exist in confederal or federal arrangements with states; in more extreme cases, these entities can serve as members of organizations such as the United Nations that are on an equal footing with states—as subjects rather than objects of international law.¹⁰⁵ Stateless nations, such as Canada's First Na-

102. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

103. U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122.

104. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72.

105. The question of what constitutes a nation is more difficult, for example, when applied to minorities as opposed to indigenous peoples whose sense of nationhood is closely related to their history as victims of a colonial regime. See discussion *supra* note 41. Although the question of exactly when a community of people *becomes* a nation is beyond the scope of this Essay, the recognition of legal status to stateless nations need not usurp the present legal distinction between minorities (the members of which have

tions, are currently neither recognized nor really even visible in international law. Let them be recognized, let them be heard, let them contribute. Colonialism will begin its end there, and this is in the best interest of the state as well, whose legitimacy and whose continued survival reside in its representation of the *peoples*.

CONCLUSION

The question posed at the beginning of this Essay, as to the possibility of a reconciliation between the demands for self-government of Canada's First Nations and the interests of the Canadian state, has no simple answer. Two important conflicts exist between them: First Nations traditions tend to privilege the collective while the state tends to privilege the individual, and First Nations traditions generally conceive of territory as communally owned while the territorial sovereignty of the state is much more like individual ownership of land as it is known in Roman law. The source of these conflicts can be found in the fact that under the definition of current international law, Canada is a state while First Nations are not and could not be states in the current legal sense of the word without seriously departing from their traditional principles. In other words, First Nations concepts of political organization are antithetical to the concept of the state in international law, which is based upon the doctrine of sovereignty.

From here, one could hypothesize that the interests of the state and the interests of First Nations are irreconcilable. That may be true insofar as one rejects the possibility of reforming the state or of reforming international law. It is, however, possible to imagine the egalitarian coexistence in international law of states and stateless nations and thus of a reconciliation between these conflicting interests. Federalism, the legal structure on which Canada's sovereignty depends, was itself an invention at one time, and involves a sharing of power between levels of government that may well have once been unimaginable.¹⁰⁶ International organizations, created in the

minority rights, such as the right to speak their own language) and peoples (who have a right of self-determination). See *supra* note 32 and accompanying text. Members of minorities who, subject to recognition of certain minority rights, are content with their representation by the state in which they live could continue in their present relationship to that state. Similarly, there may be indigenous peoples who prefer to be considered members of a minority. However, one need not require that the term "peoples" be reserved for those who once suffered colonialism, such as indigenous peoples. Nations are by definition fluid and evolving entities, and consequently the term need not be a closed proposition. According to the Center for World Indigenous Studies, in 1993 there were 191 states, *Definition of a State*, *supra* note 13, while there were between 7000 and 10,000 nations, *Definition of a Nation*, *supra* note 13.

106. As opposed to earlier notions of the nation-state, organized around the extraordinarily simply principle of "one people, one government, one territory," Daniel

post-war era in response to the realization that global problems need global administration, offer another model. They are international *states*, so to speak; an idea that may well have been inconceivable in the nineteenth century. They have international jurisdictions and this is directly in contravention of the territorial sovereignties of states. This has been possible to organize by distinguishing certain administrative jurisdictions from territorial jurisdictions. In other words, in this case we have forgone the privileging of territory as the defining factor and replaced it with functional definitions. It has been possible because the exigencies of history required it.

The scope of possible reforms and adaptations to international law is in fact very large, and the hypothesizing of new forms of organization is part of the work that remains to be done. International law has proven capable in the past of fairly radical reconceptualizations of territory as events required. Current international law is structurally unable to render justice as its subjects now define it. Ours is now a post-colonial concept of justice where one no longer forcibly applies Western criteria such as exclusively individual human rights, nor Western forms of organization such as the state, to non-Western peoples on pain of their virtual nonexistence under international law. This constitutes an historical development worthy of once again mobilizing international law's capacity for invention.

J. Elazar, *Introduction* to *FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL AND AUTONOMY ARRANGEMENTS*, at xi (Daniel J. Elazar ed., 1991), federalism developed as a second or parallel model of state-building in order to "accommodat[e] the spreading desire of people to preserve or revive the intimacy of small societies and [as a result of] the growing necessity for larger combinations to mobilize the utilization of common resources better," *id.* at xv.

